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RULE PROPOSALS

**TREASURY -- GENERAL
OFFICE OF THE PUBLIC DEFENDER
OFFICE OF DISPUTE SETTLEMENT**

44 N.J.R. 1191(a)

Pre-proposed New Rules: N.J.A.C. 17:39-4

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Notice of Pre-Proposal

Alternative Dispute Resolution Process for Underground Facility Protection Act Damages Claims

Authorized by: Joseph E. Krakora, Public Defender of New Jersey; Eric R. Max, Director, Office of Dispute Settlement.

Authority: *N.J.S.A. 48:2-80.d*, 52:27EE-21 to 23, and 2A:158A-7(j).

Pre-Proposal Number: PPR 2012-002.

Take notice that the Office of the Public Defender and its Office of Dispute Settlement (OPD/ODS) are soliciting comments about the below pre-proposed new rules governing its Underground Facility Protection Act Arbitration Program.

Pursuant to *N.J.S.A. 48:2-80.d*, ODS developed alternative dispute resolution procedures to resolve claims arising from damage to underground facilities. ODS currently distributes written procedures to parties each time a new claim is filed; the procedures are also available at: <http://www.state.nj.us/defender/UndergroundFacilityProtectionAct.pdf>. OPD/ODS will propose the formal adoption of rules and is contemplating proposing the rules below, which contain certain changes to the procedures currently in use. ODS invites comments on the draft rules set forth herein.

Written comments relating to this pre-proposal should be submitted by May 16, 2012 to:

Jessica L. Miller, Esq.
NJ Office of Dispute Settlement
PO Box 853
25 Market St.
Trenton, NJ 08625-0853

Full text of the pre-proposed new rules follows:

CHAPTER 39
OFFICE OF THE PUBLIC DEFENDER

SUBCHAPTER 4. UNDERGROUND FACILITIES PROTECTION ACT ARBITRATION PROGRAM

17:39-4.1 Purpose

(a) Pursuant to *N.J.S.A. 48:2-80.d*, a provision of the Underground Facility Protection Act, certain claims shall be subject to an alternative dispute resolution process as established within the Office of Dispute Settlement (ODS) in the Office of the Public Defender (OPD).

(b) All disputes for damages arising under *N.J.S.A. 48:2-80.d* for an amount less than \$ 25,000 shall be submitted to ODS for a mandatory dispute resolution process, which shall be arbitration as set forth herein.

(c) By mutual consent of all parties, a different Alternative Dispute Settlement provider may be selected to resolve the dispute.

(d) Disputes in the amount of \$ 25,000 or greater may be submitted to ODS for arbitration with the consent of all parties.

(e) Notwithstanding the within procedures, parties may negotiate or otherwise resolve or withdraw some or all issues relating to a dispute at any time through direct negotiation.

17:39-4.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings:

"Claimant" shall be the person or entity that claims it has sustained damage under *N.J.S.A. 48:2-80.d*.

"Dispute" shall constitute a claim arising under *N.J.S.A. 48:2-80.d* of the Underground Facility Protection Act.

"ODS" is the New Jersey Office of Dispute Settlement in the Office of the Public Defender.

"Respondent" is any party to an arbitration against whom a claim is asserted.

17:39-4.3 Initiation of arbitration

(a) To initiate arbitration, a claimant shall send a letter to ODS requesting arbitration.

(b) A request for arbitration shall include:

1. The amount of damages claimed;

2. A list of all parties (and counsel, if known) to the dispute, including address and telephone number;

3. The required filing fee as set forth in N.J.A.C. 17:39-4.4(e);

4. The location at which the damage occurred; and

5. The date on which the damage occurred.

(c) The claimant shall send a copy of the letter requesting arbitration to all parties by certified mail, return receipt requested or commercial carrier which includes tracking or other a proof of service with signature. The claimant shall subsequently provide copies of the signed return receipt cards indicating receipt of the mail to ODS as proof of service.

(d) ODS will schedule an arbitration hearing to take place within 60 days of receipt of the request for arbitration. ODS will send a notice of the hearing by regular mail to all parties.

(e) The claimant shall send a copy of the notice of the hearing to all parties by certified mail, return receipt requested or commercial carrier which includes tracking or other proof of service with signature, and provide copies of the signed return receipt cards to ODS as proof of service.

(f) Adjournments will be granted only with the approval of ODS.

1. A party requesting an adjournment shall first contact the other parties to request consent. If all parties consent, the party requesting the adjournment shall contact ODS in writing, with a copy to all parties, indicating the request for adjournment and noting that all parties have consented to same.

2. If all parties do not consent to the adjournment, the party requesting same should contact ODS in writing requesting an adjournment, indicating the reason for the request, and noting that not all parties have consented. ODS will determine whether to grant the adjournment, and notify all parties of its decision in writing within two business days of the receipt of the request.

(g) If an adjournment is granted, ODS will send a new notice with the new date and time to all parties by regular mail. The claimant shall send a copy of said notice to all parties by certified mail, return receipt requested or commercial carrier which includes tracking or other a proof of service with signature and provide copies of the signed return receipt cards to ODS as proof of service.

17:39-4.4 Fees

(a) All parties participating in the arbitration must pay their respective arbitration fees in the amounts and by no later than the time specified in this subsection.

(b) All fees must be tendered to ODS in the form of a check payable to "Treasurer- State of New Jersey."

(c) Filing fees must be received by ODS with the request for arbitration.

(d) Arbitration fees must be received by ODS from each party prior to the commencement of the arbitration hearing.

(e) The fee schedule is as follows:

[page=1192] 1. The filing fee is to be paid by the claimant in the amount of \$ 100.00.

2. Arbitration fees are to be paid by each party, and are based on the amount of the claim.

- i. For claims up to and including \$ 5,000: \$ 100.00 fee;
- ii. For claims from \$ 5,001 to \$ 15,000: \$ 150.00 fee; and
- iii. For claims from \$ 15,001 to \$ 24,999: \$ 200.00 fee.

3. Rejection fees are paid only by the party seeking to reject the award, and are based on the total amount of the actual award, regardless of the portion of the award for which the rejecting party is found liable.

- i. For awards up to and including \$ 5,000: \$ 100.00 fee;
- ii. For awards from \$ 5,001 to \$ 15,000: \$ 150.00 fee; and
- iii. For awards from \$ 15,001 to \$ 24,999: \$ 200.00 fee.

(f) ODS may, in its discretion, reduce or waive the fees for a particular party on a case-by-case basis for good cause shown. A party desiring a fee reduction or fee waiver should make its request to ODS in writing and state the reason for its request. The request need not be copied to the other parties. If the claimant wishes to request a fee reduction or fee waiver, the claimant shall include a separate letter with their request for arbitration stating the reason for the fee reduction or fee waiver request. This letter need not be copied to the other parties. ODS will call the party requesting a reduction or waiver within two business days of receipt of the request to inform the party whether the request has been granted. ODS will also send the party requesting the reduction or waiver a letter stating whether the request has been granted.

(g) The following concerns nonpayment of fees:

- 1. No arbitration will be scheduled unless and until the claimant pays the filing fee or obtains a waiver.
- 2. Failure to pay an applicable fee, except as set forth in (f) above, or otherwise comply with this subchapter will be deemed a failure to appear at arbitration pursuant to N.J.A.C. 17:39-4.5(e). Such party will be barred from participating in the arbitration.

17:39-4.5 Conduct of the arbitration hearing

(a) The following concerns the arbitrator:

- 1. An ODS staff attorney shall serve as the arbitrator. One or more members of ODS staff may assist the arbitrator in any arbitration at the discretion of ODS.
- 2. The arbitrator shall have the power to oversee the management and conduct of the hearing; administer oaths and affirmations; to determine the law and facts of the case; and to render a decision in the matter.
- 3. The arbitrator shall not be bound by the rules of evidence and shall admit all relevant evidence presented in accordance with (b) below.

(b) The following concerns information exchange between the parties:

1. At least 10 days prior to the scheduled hearing, each party shall exchange a concise statement of the factual and legal issues in the case. A copy of said statement shall be simultaneously provided to ODS by fax, e-mail or regular mail.
2. Each party shall exchange relevant documentary evidence at least 10 days in advance of the arbitration hearing and simultaneously provide ODS with copies of same, including, but not limited to, billing statements; photographs; reports; copies of mark out tickets; and other records related to the matter.
3. Any documentation not provided to all parties and to ODS according to (b)1 and 2 above may not be relied on by a party during the arbitration hearing unless the arbitrator determines, in his or her sole discretion, that exceptional circumstances prevented the timely exchange of the information.
4. The arbitrator may consider a party's unreasonable failure to produce relevant evidence during the course of the arbitration as the arbitrator deems appropriate.

(c) The following concerns confidentiality of proceedings:

1. The arbitration hearing shall not be recorded.
2. The arbitrator's findings of fact and conclusions of law shall not be evidential in any subsequent legal proceeding or trial, nor shall any testimony given at the arbitration hearing be used for any purpose at such subsequent legal proceeding, except for the enforcement of the arbitration award.
3. The arbitrator shall not be called as a witness in any subsequent legal proceeding or trial.

(d) The following concerns appearances at arbitration:

1. Each party is required to attend the arbitration hearing prepared to set forth its position and present any relevant evidence and information pursuant to N.J.A.C. 17:39-4.4(b).
2. The claimant has the burden of proving its damages.
3. An appearance on behalf of each party is required at the arbitration hearing. A party is not required to be represented by an attorney. An arbitration may be adjourned to allow a party to obtain counsel if the party so requests, at the sole discretion of the arbitrator.

(e) The following concerns the consequences of failure to appear:

1. If the party claiming damages does not appear, the arbitrator will render a decision of no award.
2. If a respondent does not appear, the arbitrator will first determine if proper service was made upon the non-appearing respondent. If proper service is found to have been made by the claimant upon the respondent failing to appear, the arbitration will proceed in the respondent's absence, and the arbitrator will render a decision.
 - i. In a case with more than one respondent, the appearing parties shall proceed to arbitration and pay the full fees.
 - ii. In a case with only one respondent, who fails to appear for the arbitration hearing despite being properly served, or in cases with several respondents, none of whom appear for the arbitration hearing despite being properly served, the matter will proceed to arbitration.
3. If the arbitrator finds that proper service has not been made upon a non-appearing respondent, the arbitration shall be

rescheduled to allow for proper service pursuant to N.J.A.C. 17:39-4.3(c) through (g).

i. The non-appearing party shall be responsible to tender the appropriate arbitration fee prior to the commencement of the rescheduled arbitration.

ii. If the appearing parties already paid the appropriate arbitration fee, they shall incur no new fees for the rescheduled hearing. If they have not yet tendered the arbitration fee, they may either do so on the day of the non-appearance in anticipation of the next date, or they may choose to tender the fee prior to the rescheduled hearing.

4. Unless a new hearing is scheduled pursuant to this subsection, failure to appear at an arbitration hearing shall be deemed a waiver of that party's right to reject an award under this subchapter.

5. A party who fails to appear for good cause may request a new hearing by sending a letter to ODS, by certified mail, return receipt requested or commercial carrier which includes tracking or other a proof of service with signature, stating the reason(s) for its non-appearance and requesting a new hearing. The non-appearing party should simultaneously send a letter to all other parties by certified mail, return receipt requested or commercial carrier which includes tracking or other a proof of service with signature indicating that they have requested a new hearing. The request may be granted for good cause in the sole discretion of ODS. If the request is granted, ODS will send a letter to the party requesting the new date, which shall include the date of the new arbitration hearing. The party requesting the new date shall, upon receipt of said letter, immediately forward a copy of same to each party in the case by certified mail, return receipt requested or commercial carrier which includes tracking or other a proof of service with signature and provide ODS with copies of the signed return receipt cards. No new information exchange shall be required in advance of the new hearing date.

17:39-4.6 Awards

(a) ODS shall mail a copy of the award to all parties no later than 10 business days after the completion of the arbitration hearing. The claimant shall immediately upon receipt of the award forward a copy of same to all parties by certified mail, return receipt requested or commercial carrier which includes tracking or other a proof of service with signature, including non-appearing parties.

(b) A party wishing to reject the award must do so within 30 days of the date on which the claimant mails a copy of the award to the parties.

(c) The party rejecting the award shall send a letter to ODS by certified mail, return receipt requested or commercial carrier which includes tracking or other a proof of service with signature indicating its rejection of the award and enclosing the appropriate rejection fee under N.J.A.C. 17:39-4.4(e)3. The rejecting party shall simultaneously send a copy of the letter by certified mail, return receipt requested or commercial carrier [page=1193] which includes tracking or other a proof of service with signature to each party, and provide ODS with the signed return receipt cards as proof of service.

(d) If no party rejects the award by sending a letter to ODS and paying the rejection fee within the 30-day period, the award shall become binding and be enforceable.

(e) If the arbitration award is rejected by any party, the parties shall be deemed to have met the statutory alternative dispute resolution requirement and any party may immediately file an action in Superior Court to pursue its damage claim.

17:39-4.7 Claims involving \$ 25,000 and above

(a) Parties to cases involving claims of \$ 25,000 and above may request arbitration through ODS.

(b) The rules in this subchapter shall apply to cases involving claims of \$ 25,000 and above, with the following exceptions:

1. The claimant is required to obtain the written consent of all parties to arbitration with ODS prior to making a request for arbitration. The letter requesting arbitration shall specifically note that the claimant has obtained the consent of all parties.

2. Fees are as follows:

i. Filing fee paid by the claimant: \$ 100.00;

ii. Arbitration fee paid by each party: \$ 250.00; and

iii. Rejection fee paid by the party rejecting the award, if the award is \$ 25,000 or more: \$ 250.00; otherwise the fees set forth in N.J.A.C. 17:39-4.4(e) shall apply.